

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI, OFFICE OF
ADMINISTRATION, ET AL.**

APPELLANTS,

**v.
NATIONWIDE LIFE INSURANCE
CO., ET AL.**

RESPONDENTS.

DOCKET NUMBER WD72383

DATE: March 8, 2011

Appeal From:

Cole County Circuit Court
The Honorable Patricia S. Joyce, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Attorneys:

James R. Layton, Peggy A. Whipple, Mark E. Long, and Jennifer Redel-Reed, Jefferson City, MO, for appellants.

James B. Deutsch, Marc H. Ellinger, and Thomas W. Rynard, Jefferson City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

This dispute arises out of Nationwide Life Insurance Co.'s withholding of an \$18,586,379.65 market value adjustment from the State's deferred compensation fund assets transferred by Nationwide to a new investment provider. The State of Missouri, Office of Administration, and Missouri State Employees Deferred Compensation Commission filed suit against Nationwide and National Retirement Systems for breach of contract, for breach of the implied covenant of good faith and fair dealing, and for breach of fiduciary duty. The trial court entered summary judgment in favor of Nationwide and National Retirement Systems on all six counts of the State's petition and denied the State's competing motion for partial summary judgment. The State appeals.

The State contends that the trial court erred in granting summary judgment in favor of Nationwide and National Retirement Systems because: (1) the undisputed facts support a finding that the investment provider contract between the State and Nationwide, which expired by its terms, nonetheless controlled the parties' rights and obligations and did not authorize Nationwide to withhold a market value adjustment; (2) the trial court erroneously concluded as a matter of law that a fixed annuity contract between the State and Nationwide survived the expiration of the investment provider contract and independently permitted Nationwide to withhold a market value adjustment; (3) the undisputed facts support a finding that Nationwide breached the implied covenant of good faith and fair dealing by unilaterally attempting to resurrect market value adjustment provisions from the investment provider contract that were "deleted and replaced" by an amendment; (4) assuming, arguendo, that Nationwide appropriately withheld a market value adjustment, there are genuine issues of material facts in dispute regarding how it was calculated; and (5) the undisputed facts show that National Retirement Systems breached its third party administrator contract with the State by failing to procure an extension of the investment provider contract from Nationwide.

Affirmed in part, reversed in part, and remanded with instructions.

(1) It is apparent from the unambiguous terms of the investment provider contract that the clear intention of the parties was to permit the State to use two annuity products offered by Nationwide subject to the terms of the investment provider contract. Thus, the investment provider contract and the two annuity product contracts formed a single contract.

(2) There is no factual or legal basis for the trial court to have concluded that the fixed annuity contract had no durational term. To the contrary, a durational term was an unambiguous part of the parties' collective agreement, which included the annuity product contracts. The trial court erroneously concluded that the fixed annuity contract did not have a durational term and survived the expiration of the investment provider contract.

(3) The unambiguous language of the investment provider contract, the renewal agreement, and each of its amendments, reflect the parties' intent that the expiration of the renewal agreement as amended marked the natural expiration of the parties' agreement including the annuity product contracts.

(4) The original provisions of the investment provider contract addressing a market value adjustment were permanently deleted and replaced by the provisions addressing a market value adjustment in the third and fourth amendments to the renewal agreement, rendering Nationwide's reliance on the provisions to justify withholding a market value adjustment illusory. The trial court could not have concluded that Nationwide was entitled to withhold a market value adjustment based on a theory that the original market value adjustment provisions were resurrected upon expiration of the renewal agreement.

(5) The trial court erroneously concluded that two letters exchanged between Nationwide and the State after the expiration of the parties' agreement formed a new contract authorizing a continued relationship pursuant to the terms of the fixed annuity contract. The letters do not satisfy the essential elements of a contract.

(6) The parties were operating after the expiration of their agreement pursuant to a provision which described Nationwide's continuing obligation to assist with the orderly transfer of responsibility to a new investment provider--an obligation which expressly arose upon expiration of the parties' agreement. Nationwide was not entitled to withhold a market value adjustment at the conclusion of the transition period because the parties had not agreed to permit Nationwide the right to withhold a market value adjustment at the end of the transition period.

(7) A party does not have an implied duty of good faith and fair dealing requiring it to agree to renew a contract that is set to expire by its terms.

(8) The State suffered no damage due to National Retirement System's alleged failure to secure an extension of the investment provider contract.

Opinion by Cynthia L. Martin, Judge

March 8, 2011

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